

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SCHREE R. WADE, a married person,

Plaintiff,

V.

PREMERA BLUE CROSS, a corporation, and KERRY LUCIANI, an individual

Defendant.

NO: CV-10-217-RMP

ORDER GRANTING PLAINTIFF'S  
MOTION TO AMEND COMPLAINT  
AND DENYING PLAINTIFF'S  
MOTION FOR REMAND

## INTRODUCTION

Before the Court are the Plaintiff's Motion to Amend Complaint, ECF No. 36, Motion for Remand, ECF No. 58, and Motion to Expedite, ECF No. 55. The Court has reviewed all of the relevant pleadings and the file and is fully informed.

## BACKGROUND

18 The Plaintiff, Schree R. Wade, filed her complaint in Spokane County  
19 Superior Court on June 7, 2010. ECF No. 1 at 7-15. Defendant Premera Blue  
20 Cross (“Premera”) removed the action to this Court on July 13, 2010. ECF No. 1.

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1 The Court has entered three scheduling orders in this case with the most  
2 recent scheduling order containing a discovery deadline of June 10, 2011, and a  
3 dispositive motion deadline of June 22, 2011. ECF Nos. 16, 26.

4 On June 10, 2011, the Plaintiff filed the instant Motion to Amend  
5 Complaint, ECF No. 36. The Plaintiff moved to expedite the hearing on that  
6 motion, but the Court denied the Motion to Expedite due to the jurisdictional  
7 consequence of amendment. ECF No. 45.

8 On June 22, 2011, the Defendants filed a Motion for Summary Judgment.  
9 ECF No. 40. On July 6, 2011, the Plaintiff filed the instant Motion for Remand,  
10 ECF No. 58, and Motion to Expedite, ECF No. 55.

## 11 DISCUSSION

### 12 Motion to Amend Complaint

13 The Plaintiff seeks leave to amend her complaint arguing that such an  
14 amendment is necessary to limit her claims following discovery. ECF No. 37 at 2.  
15 The Plaintiff has attached a proposed amended complaint in which she eliminates  
16 all of her claims for wrongful discharge and modifies her claim for discrimination.  
17 *Compare* ECF No. 1 at 7-15 *with* ECF No. 37-1. The Defendants only partially  
18 oppose the Plaintiff's motion. ECF No. 46. While the Defendants agree with the  
19 Plaintiff's decision to eliminate her wrongful discharge claims, the Defendants take  
20 issue with the Plaintiff's amendment of her discrimination claim. ECF No. 46 at 2.

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1 The Defendants suggest that the Court either should dismiss the wrongful  
2 termination claims and leave the remainder of the complaint intact, or only  
3 partially grant leave to amend and limit amendment to the Plaintiff's wrongful  
4 discharge claims.

5 Typically, amendment of a pleading is governed by Rule 15. *See* Fed. R.  
6 Civ. P. 15. Rule 15 provides for a single amendment as a matter of course if such  
7 amendment is within twenty-one days of service of the original complaint, or, if  
8 the pleading requires a response, twenty-one days from service of that response or  
9 service of a motion under Rule 12(b) or 12(f). Fed. R. Civ. P. 15(a)(1)(A)-(B). "In  
10 all other cases, a party may amend its pleading only with the opposing party's  
11 written consent or the court's leave. The court should freely give leave when  
12 justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 15 prescribes a liberal  
13 standard. *AmerisourceBergen Corp. v. Dailysist West, Inc.*, 465 F.3d 946, 951 (9th  
14 Cir. 2006). "But a district court need not grant leave to amend where the  
15 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3)  
16 produces an undue delay in litigation; or (4) is futile." *Id.*

17 Both parties appear to agree that amendment is warranted with regard to the  
18 wrongful discharge claims. Additionally, limiting the existing claims will promote  
19 efficient use of the Court's time. Accordingly, the Court finds that the interests of  
20 the justice support granting the Plaintiff's motion for leave to amend.

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1 The Defendants assert that the Court should take a different tack. The  
2 Defendants are concerned with this Court's retaining jurisdiction. The proposed  
3 amended complaint does not contain any federal causes of action, and the parties  
4 are not fully diverse. While the Defendants agree with the Plaintiff's decision not  
5 to pursue her wrongful discharge claims, the Defendants take issue with the  
6 Plaintiff's proposed amendment of her discrimination claims. The Defendants  
7 argue that the main reason behind Plaintiff's proposal to amend her discrimination  
8 claims is to position the case for remand because the state and federal  
9 discrimination causes require similar factual showings. ECF No. 46 at 2. The  
10 Defendants request that instead of granting the Plaintiff's motion for leave to  
11 amend wholesale, the Court should simply dismiss the Plaintiff's wrongful  
12 discharge claims and keep the remainder of the complaint intact or that the Court  
13 should grant leave to amend in part and allow only the amendment of the  
14 Plaintiff's wrongful discharge claims while barring the Plaintiff from amending her  
15 discrimination claims.

16 The Court is not adopting either of the Defendants' suggestions. The  
17 Plaintiff has not moved for a voluntary dismissal of any of her claims, nor have the  
18 Defendants brought a motion to dismiss the wrongful discharge claims. Instead,  
19 the Plaintiff seeks to file a new complaint that identifies the causes of action on  
20 which she wishes to proceed. The Defendants cite to no authority identifying

1 selective dismissal as a remedy available for a motion for leave to amend  
2 complaint.

3       Similarly, the Defendants have not identified any authority that would allow  
4 the Court to dictate what claims the Plaintiff may choose to omit in her amended  
5 complaint. It is true that a district court may impose ““reasonable conditions’ on a  
6 grant of leave to amend a complaint,” *Int'l Ass'n of Machinists and Aerospace*  
7 *Workers v. Republic Airlines*, 761 F.2d 1386, 1391 (9th Cir. 1985) (quoting  
8 *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1386 (10th Cir. 1980)).  
9 While such conditions may include compensation for losses or expenses incurred  
10 as a result of the original complaint’s deficiencies, *Firchau v. Diamond Nat'l*  
11 *Corp.*, 345 F.2d 269, 275 (9th Cir. 1965), or a time limit for the filing of an  
12 amended complaint, *E.g. Rossi v. McCloskey & Co.*, 149 F. Supp. 638, 641 (D.C.  
13 Pa. 1957), the Court does not find that is appropriate to grant leave for a plaintiff to  
14 amend his or her complaint to remove certain claims and then dictate which claims  
15 are appropriate for the Plaintiff to remove.

16       The Court will grant the Plaintiff’s motion to amend the complaint and allow  
17 the Plaintiff to file her proposed amended complaint as drafted.

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1 **Motion for Remand**

2 A plaintiff may seek remand of a removed action based on any defect in the  
3 removal, including lack of subject matter jurisdiction. 28 U.S.C. § 1447(c). If a  
4 district court lacks subject matter jurisdiction over a removed action, then the  
5 district court must remand that action. *Sparta Surgical Corp. v. Nat'l Ass'n of Sec.*  
6 *Dealers, Inc.*, 159 F.3d 1209, 1211 (9th Cir. 1998). “The removal statute is strictly  
7 construed, and any doubt about the right of removal requires resolution in favor of  
8 remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir.  
9 2009) (citing *Gaus v. Miles, Inc.*, 980 F.2d 546, 566 (9th Cir. 1992)).

10 For the purposes of removal, “jurisdiction must be analyzed on the basis of  
11 the pleadings filed at the time of removal without reference to subsequent  
12 amendments.” *Sparta*, 159 F.3d at 1213 (citing *Pfeiffer v. Hartford Fire Ins. Co.*,  
13 929 F.2d 1484, 1488 (10th Cir. 1991)). Accordingly, “a plaintiff may not compel  
14 remand by amending a complaint to eliminate the federal question upon which  
15 removal was based.” *Id.*

16 If an amendment to a complaint eliminates the federal claims that formed the  
17 basis for removal and leaves only pendent state law claims, the district court has  
18 discretion to remand the pendent state-law claims. *Carnegie-Mellon Univ. v.*  
19 *Cohill*, 484 U.S. 343, 357 (1988). “A district court’s decision whether to exercise  
20 [pendent jurisdiction over state-law claims] after dismissing every claim over

1 which it had original jurisdiction is purely discretionary.” *Carlsbad Tech., Inc. v.*  
2 *HIF Bio, Inc.*, 129 S. Ct. 1862, 1866 (2009) (citing 28 U.S.C. § 1337(c)). “[A]  
3 district court should consider “the values of judicial economy, convenience,  
4 fairness and comity in order to decide whether to exercise jurisdiction over a case  
5 brought in that court involving pendent state-law claims.” *Cohill*, 484 U.S. at 350.  
6 A district court can and should consider whether the plaintiff has attempted to  
7 manipulate the forum when the court decides whether remand is appropriate. *Id.* at  
8 357.

9 In this case, the Plaintiff’s original complaint provided federal question  
10 subject matter jurisdiction. However, in her proposed amended complaint, the  
11 Plaintiff has removed all of her federal claims. While such amendment does not  
12 compel remand, the Court has the discretion to remand the case or retain pendent  
13 jurisdiction. *See id.* In light of the Court’s conclusion to accept the proposed  
14 amended complaint for filing, the Court must balance the factors and determine  
15 whether remand is appropriate. The Court is mindful of the fact that “in the usual  
16 case in which all federal-law claims are eliminated before trial, the balance of  
17 factors will point toward declining to exercise jurisdiction over the remaining state-  
18 law claims.”’ *Acri v. Verian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997)  
19 (quoting *Cohill*, 484 U.S. at 350 n.7). However, a review of the factors in this case  
20 reveals that retention is appropriate.

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1       Judicial economy is the essential policy behind the modern doctrine of  
2 pendent jurisdiction. *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1347-48 (7th Cir.  
3 1986), *cited with approval in Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir.  
4 1991). In determining whether judicial economy supports retention or remand, the  
5 district court should consider “whether enough resources have been expended” to  
6 warrant retention. *Schneider*, 938 F.2d at 994. “The district court, of course, has  
7 the discretion to determine whether *its* investment of judicial energy justifies  
8 retention of jurisdiction.” *Id.* (quoting *Otto v. Heckler*, 802 F.2d 337, 338 (9th  
9 Cir. 1986)).

10       This case has been pending for more than one year. During that time, the  
11 Court has issued five orders, ECF Nos. 12, 16, 26, 44, 45. While none of those  
12 orders has addressed the Plaintiff’s substantive claims, the Defendants’ summary  
13 judgment motion is currently pending and has been fully briefed by both parties.  
14 The resources that have been invested in this case are significant.

15       The value of comity weighs in favor of remand. The only remaining claims  
16 are Washington law claims. Although the Washington court system has an interest  
17 in enforcing and interpreting its own laws, none of the present claims raises novel  
18 issues..

19       The convenience of the parties does not weigh in favor of either outcome.  
20 Both the Spokane County Superior Court and this Court are located in the City of

1 Spokane and will be equally convenient to the parties. In addition, both tribunals  
2 will provide a fair forum for litigation.

3 The Defendants argue that the Plaintiff's amendments are a calculated  
4 attempt at forum shopping that will delay the action, resurrect the Plaintiff's ability  
5 to seek a jury trial, and avoid resolution of this case on the pending motion for  
6 summary judgment. ECF No. 77 at 8. The Court finds that these factors provide a  
7 convincing basis for retaining jurisdiction.

8 There is strong circumstantial evidence to support the Defendants'  
9 contention that the Plaintiff's motion for leave to amend was based on a desire to  
10 manipulate the forum. The Defendants do not take issue with the Plaintiff's  
11 decision to remove her claims for wrongful discharge, and the Plaintiff's proposed  
12 amended complaint removes both federal and state-law claims for wrongful  
13 discharge. *See* ECF No. 1 at 11-12. Instead, the Defendants focus on the  
14 Plaintiff's changing claims for discrimination. In her original complaint, the  
15 Plaintiff's claims for discrimination read as follows:

16 **4.2. Second Cause of Action – Discrimination**

17 4.2.1. Plaintiff reasserts and realleges paragraphs 1.1 through  
18 4.1.3.6 and incorporates the same herein.

19 4.2.2. The wrongful acts and omissions of the Defendants, and  
20 each of them, constitute discriminatory violations of Washington State  
laws RCW 49.60, *et seq.*, and federal anti-discrimination statutes,  
including but not limited to, the American (sic) with Disabilities Act.

1           4.2.3. The Defendants, and each them (sic), also violated the  
2 American (sic) with Disabilities Act by not reasonably  
3 accommodating the Plaintiff as requested by her medical provider.

4 ECF No. 1 at 12.

5           In her proposed amended complaint, the claims for discrimination read:

6           **4.1 First Cause of Action- Discrimination**

7           **4.1.1** Plaintiff reasserts and realleges paragraphs 1.1 through  
8 3.19 and incorporates the same herein.

9           **4.1.2** The wrongful acts and omissions of the Defendants, and  
10 each of them, constitute discriminatory violations of Washington State  
11 laws RCW 49.60, et seq.

12           **4.1.3** The Defendants, and each them (sic), also failed and  
13 refused to provide Plaintiff with reasonable accommodation in her  
14 work place as requested by her medical provider, in violation of state  
15 law.

16 ECF No. 37-1 at 5.

17           It is readily apparent that the amendments to the complaint remove any  
18 references to the Americans with Disabilities Act (“ADA”). What is most striking  
19 is the removal of the ADA claim for failure to make reasonable accommodation.  
20 In order to establish a prima facie case under the ADA that an employer failed to  
21 reasonable accommodate a disability, a plaintiff must demonstrate that: “(1) he [or  
22 she] is disabled within the meaning of the ADA; (2) he [or she] is a qualified  
23 individual able to perform the essential functions of the job with reasonable

1 accommodation; and (3) he [or she] suffered an adverse employment action  
2 because of his [or her] disability.” *Allen v. Pacific Bell*, 348 F.3d 1113, 1114 (9th  
3 Cir. 2003) (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir.  
4 1996). One of the definitions of disability under the ADA is “a physical or mental  
5 impairment that substantially limits one or more major life activities of such  
6 individual.” 42 U.S.C. § 12102(1)(A).

7 In order to establish a claim for failure to reasonably accommodate a  
8 disability under Washington law, a plaintiff must show:

9 (1) he or she had a sensory, mental, or physical abnormality that  
10 substantially limited his or her ability to perform the job; (2) he or she  
11 was qualified to do the job; (3) he or she gave the employer notice of  
12 the abnormality and its substantial limitations; and (4) after notice, the  
13 employer failed to adopt available measures that were medically  
14 necessary to accommodate the abnormality.

15 *Becker v. Cashman*, 128 Wn. App. 79, 84 (2005) (citing *Riehl v. Foodmaker, Inc.*,  
16 152 Wn.2d 138, 145 (2004)).

17 While there is not a perfect overlap between the ADA and Washington law,  
18 the showings required to establish claims under the ADA and Washington law for  
19 failure to accommodate a disability are strikingly similar. The fact that the claims  
20 require similar showings suggests that the Plaintiff’s decision to eliminate her  
claim under the ADA may have been motivated by a desire to seek remand rather  
than because the claim was no longer viable.

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This conclusion is buttressed by the timing of the motions for amendment and remand. The motion to amend complaint, ECF No. 36, was filed on June 10, 2011, the day discovery closed. The motion was filed after Premera filed its motion to file an over-length brief in support of its motion for summary judgment. The motion to remand, ECF No. 58, was filed after the motion for summary judgment had been filed.

When all of the factors are taken together, the Court concludes that the appropriate course of action is to retain jurisdiction. The Defendants' motion for summary judgment has been noted for hearing in the near future. Retaining jurisdiction ensures fairness in the proceedings and does not offend notions of comity or convenience.

## CONCLUSION

The Court finds that the ends of justice are best served by granting the Plaintiff leave to amend her complaint. However, despite the fact that the proposed amended complaint fails to allege a cause of action under federal law, the Court concludes that the interests of judicial economy, convenience, fairness, and comity support this Court's retention of jurisdiction.

**Accordingly, IT IS HEREBY ORDERED:**

1. The Plaintiff's Motion to Amend Complaint, **ECF No. 36**, is

## GRANTED.

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1       2. The Plaintiff shall file her First Amended Complaint no later than **10**  
2       **days** from the entry of this Order.

3       3. The Plaintiff's Motion to Expedite, **ECF No. 55**, is **DENIED AS**  
4       **MOOT**.

5       4. The Plaintiff's Motion to Remand, **ECF No. 58**, is **DENIED**.

6       **IT IS SO ORDERED.**

7       The District Court Executive is hereby directed to enter this Order and to  
8       provide copies to counsel.

9       **DATED** this 29th of August 2011.

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11       \_\_\_\_\_  
12       *s/ Rosanna Malouf Peterson*  
13       ROSANNA MALOUF PETERSON  
14       Chief United States District Court Judge  
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